

**ETHICS COMMISSION
CITY AND COUNTY OF HONOLULU**



ADVISORY OPINION NO. 105

The question is whether the retention of an active real estate broker's license [license] conflicts or appears to conflict with the official duties of a member of the Board of Review [Board].

The Board member will be violating Section 11-102.3, Revised Charter of the City and County of Honolulu 1973 (1979 Supp.) [RCH] and Sections 6-1.2(a)(1), (a)(2), and (a)(3), Revised Ordinances of Honolulu 1978 [ROH], if he participates in any proceeding of the Board involving real property owned, leased, or controlled by his company or him [appealed property]. He will also be violating Section 11-102.2, RCH, if he obtains and uses confidential information developed by the Real Property Tax Division for private purposes.

Following are the facts which result in the applicability of several standards of conduct in the RCH and the ROH, if other facts are present:

1. The Board member is an officer and employee of a finance company [company], a loan company which extends loans in connection with land development, construction of improvements on land, sale, and purchase of improved or unimproved land, and which also manages rental property.
2. He has an active real estate broker's license for the purpose of sale or purchase of improved or unimproved land for the company.
3. He has been appointed by the Mayor to serve on the Board to hear appeals of real property tax assessments filed with the City. He was appointed to the Board because of his expertise relative to real property gained or obtained through his real estate broker transactions.
4. The brokering of real property is his primary source of livelihood and the reason for his employment with his company.
5. As a member of the Board, he is privy to confidential information relative to real property used as indices or benchmarks to determine the value of comparable real property. However, he testified that such record is not useful for his purposes in the buying and selling of real estate. His reason was that such information is not sufficiently current for private use. As an example, he stated that if a real property is on appeal in 1982, for useful valuation purposes the

comparable sales record of the City reflects such sales up to 1980. This record is used to determine whether or not the subject real property is properly assessed. The reason for the lag is because for tax purposes the City is required to assess real property uniformly throughout the City. To do this, it cannot use comparable sales of 1980 or 1981 because not all of the sales within those calendar years have been recorded. The calendar year in which all real property transactions have been recorded is up to 1980. However, for his business he will have to consider 1981-82 comparable sales to determine the value of the real property which may be on the market or which may be on his listing.

6. The Board member was formerly a member of the State Board of Review for tax appeal purposes.

7. The State Board of Review had a practice requiring a member to abstain from any proceeding in which he or she had a personal interest in the appealed property.

Under the foregoing facts, the standards of conduct which may be applicable if there is a violation are:

1. Standards of conduct found in the RCH:

a. Section 11-102.2 provides that no officer or employee shall disclose any confidential information gained by reason of his or her employment or office; and

b. Section 11-102.3 states that no officer or employee shall engage in any business activity which is incompatible with the proper discharge of his or her official duties or which might impair his or her independence of judgment.

2. Standards of conduct in the ROH:

a. Section 6-1.2(a)(1) states that no officer or employee shall, as a representative of the City, participate in any official action involving any business in which he or she has a financial interest;

b. Section 6-1.2(a)(2) states that no officer shall acquire a financial interest in a business enterprise which will be before him or her for official action; and

c. Section 6-1.2(a)(3) states that no officer or employee shall appear in behalf of any private interest before any City agency except a court of law, nor shall any officer or employee represent any private interest in any action or proceeding against the City.

There are exceptions in Section 6-1.2(a)(3), ROH, but they are not applicable to the facts of this case because the Board exercises quasi-judicial powers which make the exceptions inapplicable.

Section 11-102.3, RCH, and Sections 6-1.2(a)(1), (a)(2) and (a)(3), ROH, will apply if the Board member does not abstain in all actions on real property which is on appeal before the Board and in which he or his company has an interest.

Under Section 11-102.3, RCH, if the Board member does not abstain from participating in all Board proceedings involving the appealed property, allegations may be made that he favored his company or his own interests. If so, further allegations can be made that his judgment was impaired, or that he did not properly discharge his duties as a member of the Board. With respect to Section 6-1.2(a)(1), ROH, if he fails to abstain, he may be alleged to have participated in an official action involving the appealed property. The same allegation can be made of Section 6-1.2(a)(2), ROH, because the appealed property is an interest which he acquired and which may come before him for official action. Another allegation can be made under Section 6-1.2(a)(3), ROH, that, because of the appealed property which is before the Board, he is representing private interests before the Board if he does not abstain when the appealed property is before the Board.

The public's perception of the Board member's situation can be characterized as a case of actual conflict. Such public attitude may be justified because he has a real estate broker's license and yet he serves on a board which deals primarily with real property. Despite such attitude, for the Ethics Commission [Commission] to recommend to his appointing authority that he should inactivate his license would be unreasonable. Such recommendation would be unreasonable because his license is his source of livelihood. Also, his company deals in real property and his license is necessary for any real estate transaction involving his company. Moreover, a City official has informed the Commission that the Board should be made of two members who are knowledgeable about real estate.

On the other hand, this Commission is not prohibited from submitting recommendations which it believes may allay public concern because of the Board member's situation. Accordingly, the Commission submits the following recommendations to be considered and adopted by the Board:

1. After the Board member has declared a conflict of interest because of an appealed property, he should leave the meeting room; and
2. He should not accept or retain any compilation of comparable sales of real property used to determine the value of the appealed property.

The first recommendation is to give the other members of the Board an opportunity for free and unfettered discussion regarding the appealed property. Moreover, by adhering to such a procedure, it may lessen the criticism of the Board and minimize allegations of cronyism between members of the Board.

The second recommendation should allay public concern because the compiled comparable sales record which is confidential is not available to him. Thus, the Board member would have to develop his own comparable sales record for the appealed property. Also, this procedure will minimize any allegation that he had disclosed or used confidential information for his private gain.

In summation, the Commission finds that the Board member's active license is his main source of livelihood and necessary for any transaction involving his company. Therefore, this Commission will not recommend inactivation of his license. To do so would be unreasonable, provided he follows the recommendations which are made herein.

The public will be concerned regarding the Board member's situation because he has a license and participates on the Board which deals primarily with real property. Thus, to allay such concern he should abstain from participating in any board proceeding involving his appealed property. If he does participate he may be found to have violated the applicable standards of conduct (Section 11-102.2 and 11-102.3, RCH, and Section 6-1.2(a)(1), (a)(2), and (a)(3), ROH). To further allay the concerns of the public, the Commission recommends (1) that he leave the meeting room after he has declared his conflict; and (2) that he should not accept or retain any compilation of comparable sales which are confidential in reference to his appealed property.

Dated: August 18, 1982

MAZEPPA K. COSTA
Chair, Ethics Commission